IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1948~~. 1949

No. ~~178~~ 178

J. BAKER BRYAN, SR., *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, J. Baker Bryan, Sr., by his undersigned attorneys, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the denial by that Court—entered in the above cause on June 10, 1949 (R. 365)—of a motion to amend the judgment entered on May 13, 1949 (R. 349).

Jurisdiction.

Jurisdiction is conferred upon the Supreme Court to review this cause by writ of certiorari by Section 1254 of the Judicial Code (Title 28 U. S. C. A.) as enacted June 25, 1948; and the petition is timely within the purview of Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

Summary Statement of the Matter Involved.

The Circuit Court of Appeals for the Fifth Circuit in reversing a criminal conviction remanded this cause for a new trial. Your petitioner respectfully submits that instead of ordering a new trial, the holding of the appellate Court required it to order a judgment of acquittal; and the defense moved the Court to so amend its judgment. The Court denied this motion—we therefore apply for certiorari on the grounds hereinafter set forth.

The prior proceedings giving rise to the action of the appellate Court are as follows:

The petitioner was tried in the District Court of the United States for the Southern District of Florida under an indictment alleging that the petitioner filed false and fraudulent income tax returns for the years 1941, 1942, 1943, and 1944. The jury acquitted for the years 1941 and 1942 but convicted for the years 1943 and 1944.

At the close of the Government's case the defense moved the Court for a judgment of acquittal (R. 309, 310) and the Court denied the motion (R. 310). The defendant then presented its evidence; and, at the conclusion of all the testimony, the defense again moved the Court for a judgment of acquittal (R. 318). The Court denied the motion (R. 319).

After the jury returned its verdict the defense made a timely motion for a judgment of acquittal, and in the alternative moved the Court to grant a new trial (R. 18-21). The Court denied the motion (R. 23).

An appeal was filled in the United States Court of Appeals for the Fifth Circuit, and that Court, after argument

(R. 349) reversed the judgment of the District Court and remanded the cause for a new trial (R. 356) on the grounds that the evidence

> "was insufficient to make out a *prima facie* case against the Defendant on the net worth-expenditure basis, and the case should not have been submitted to the jury . . ." (R. 356).

Your petitioner then filed a motion requesting the Court to amend its judgment to conform to Rule 29(a) of the Federal Rules of Criminal Procedure (R. 361-364); that is, to order a judgment of acquittal, instead of a new trial, because that rule required the District Court to so do

> "if the evidence is insufficient to sustain a conviction of such offense or offenses." (Rule 29(a).)

On June 10th the Court of Appeals denied your petitioner's motion (R. 365), ignoring Rule 29(a) and holding that Rule 29(b) sanctioned the granting of a new trial, assuming that the appellate Court is included in the rule; and if the rule does not apply to the appellate Court, then its judgment was authorized by Section 2106, Title 28 U. S. C. A.

The Court below wrote an opinion on the motion, which opinion begins as follows:

> "On the appeal of the accused this Court set aside the verdict and sentence and ordered a new trial. This was on the ground that the evidence presented did not authorize a verdict of guilty, one judge dissenting. The majority thinking the defect in the evidence might be supplied on another trial directed that it be had." (R. 365.)

Your petitioner's position is that the appellate Court, having determined that "the case should not have been submitted to the jury" (R. 356) and "that the evidence presented did not authorize a verdict of guilty" (R. 365), was required to do what the District Court should have done; that is, grant the motion for a judgment of acquittal

made at the conclusion of all the evidence (R. 318, 319)—to do otherwise would impose upon the defendant double jeopardy. Hence, from your petitioner's viewpoint, these are the

Questions Presented.

1. Upon a holding that the evidence was insufficient for submission of the cause to a jury, and assuming the Federal Rules of Criminal Procedure inapplicable, can the Court order a new trial, or does justice require the entry of a judgment of acquittal?

2. Would not a new trial be a serious invasion of the rights which accrued to petitioner in the lower Court, and would it not strip away from him without just cause the real effectiveness of a reversal?

3. Would not a new trial upon a holding that the evidence was insufficient for submission of the cause to a jury place the defendant in double jeopardy?

4. Is the United States Court of Appeals "included" in the Federal Rules of Criminal Procedure, as stated in Rule 54, or is it excluded as the Fifth Circuit appears to believe?

5. If the Federal Rules of Criminal Procedure do not apply to the United States Court of Appeals, but Section 2106 of Title 28 U. S. C. A. does apply, then is a demand for a new trial "an appropriate judgment, decree or order" and "just" upon a holding by such Court that the evidence was insufficient for submission of the cause to a jury?

6. If the Federal Rules of Criminal Procedure are applicable to the United States Court of Appeals, has the Court an election upon a holding that the evidence was insufficient for submission of the cause to a jury to disregard Rule 29(a) and proceed under Rule 29(b)?

7. Was the appellate Court—in remanding the cause upon a holding that the evidence was insufficient for sub-

mission of the cause to the jury—required to do what the trial Judge would be required to do upon correctly ruling on the question of law presented by the motion for a judgment of acquittal; that is, order the entry of judgment of acquittal as required by Rule 29(a) of the Federal Rules of Criminal Procedure?

Reasons for Granting the Writ.

1. The Court below has decided an important question of Federal appellate practice in a way that is in conflict with the applicable decisions of this Court. The Circuit Court in effect held that upon a holding that the evidence was insufficient for submission of the cause to a jury, it was within the discretion of the Court to order a new trial instead of ordering an entry of judgment of acquittal.

This Court in *Baltimore & Caroline Line, Inc.* v. *Redman* (1935) (295 U. S. 654), a civil case, after disposing of the propriety of reserving the question of law until after verdict, and affirming the finding of the Circuit Court that the evidence was insufficient to support the verdict, modified the Circuit Court's direction of a new trial; and, substituted a direction for a judgment of dismissal.

This Court in *Bozza* v. *U. S.* (1947) (330 U. S. 160) indirectly approved the entry of a judgment of acquittal upon a holding that the evidence was insufficient to sustain a conviction in a criminal case. The indictment involved five counts, and the Third Circuit affirmed on the first three counts and reversed and demanded for the entry of a judgment of acquittal on the fourth and fifth counts on the grounds that the testimony was insufficient to sustain a conviction (155 Fed. 2d 592). This Court in reversing as to counts two and three did not comment on the lower Court's handling of the fourth and fifth counts. The record was before this Court, and if this Court had not been satisfied with the lower Court's disposition of counts four and five, it is reasonable to assume it would have directed as to counts two and three a form of order differing from

the order the lower Court directed on counts four and five.

This Court in an opinion by an equally divided Court in *U. S.* v. *Stone* (1939) (308 U. S. 519) affirmed the Seventh Circuit (101 Fed. 2d 870) in a case where the trial Judge rendered judgment of dismissal, and the Government sought to substitute an order for a new trial—the Seventh Circuit denied the Government's petition for a writ of mandamus. Arising before the Federal Rules of Criminal Procedure this case presented other obstacles; nevertheless, judgment of dismissal was the proper remedy.

2. The Court below has rendered a decision in conflict with the decisions of the Third, Seventh, and Ninth Circuits on the same matter, as well as its former decisions. The Third Circuit in *U. S.* v. *Bozza* (*supra*) (155 Fed. 2d 592, 597), in *U. S.* v. *Renee Ice Cream Company* (160 Fed. 2d 353, 358), and in *U. S.* v. *Johnson* (165 Fed. 2d 42, 50) directed judgment of acquittal upon finding the evidence insufficient for submission of the cause to the jury. The Ninth Circuit in its opinion in *Karn* v. *U. S.* (158 Fed. 2d 568, 573) reviewed the subject of the kind of order to make on demand at some length and held that a judgment of acquittal was required. The Seventh Circuit adopted the same procedure in *U. S.* v. *Gardner* (171 Fed 2d 753, 759).

The following three cases all arose in the Fifth Circuit:

In *Thomas* v. *U. S.* (162 Fed. 2d 301) two defendants were convicted. The Court held that the evidence was not sufficient to justify a conviction as to one of the defendants and reversed with directions to vacate the judgment against that defendant and discharge him. In *Sullivan* v. *U. S.* (161 Fed. 2d 629) the Court reversed the judgment of conviction with direction to acquit the defendant. In *Carothers* v. *U. S.* (161 Fed. 2d 716) the conviction on some counts in the indictment was affirmed. On other counts the case was reversed for new trial because of erroneous charges. On one count the conviction was reversed with directions to dismiss as to that count.

3. The Court below has rendered a decision that appears to cast doubt upon the applicability of the Federal Rules of Criminal Procedure to Circuit Courts despite the fact that Rule 54 expressly states that they apply to all criminal proceedings in the "United States circuit court of appeals"; whereas, the Third Circuit in *U. S.* v. *Bozza* (155 Fed. 2d 592, 597), *U. S.* v. *Renee Ice Cream Company* (160 Fed. 2d 353, 359), and *U. S.* v. *Johnson* (165 Fed. 2d 42, 50); the Ninth Circuit in *Karn* v. *U. S.* (158 Fed. 2d 568, 573); and the Seventh Circuit in *U. S.* v. *Gardner* (171 Fed. 2d 753, 759) expressly rely upon the said rules as authority for the entry of judgment of acquittal. The action of the Fifth Circuit, if not reviewed by this Court, will seriously affect the administration of justice and the application of the Federal Rules of Criminal Procedure before the Circuit Courts.

4. The Court below by relying on Section 2106 of Title 28 U. S. C. A. (R. 371) and by-passing the more specific requirements of Rule 29 of the Federal Rules of Criminal Procedure has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision; particularly in view of the fact that Section 3772 of Title 18 U. S. C. (Crimes and Criminal Procedure) which was approved the same day as Title 28 (Judiciary and Judicial Procedure), June 25, 1948, provides that nothing contained therein shall limit, supersede, or repeal existing rules.

5. The Court below by treating the motion made after verdict—that is, for judgment of acquittal or in the alternative a new trial (R. 18-21)—as one giving the Court an election, is in conflict with applicable decisions of this Court. In *Montgomery Ward & Co.* v. *Duncan* (1940) (311 U. S. 243) this Court held in passing on a similar rule under the Federal Rules of Civil Procedure (Rule 50(b)) that each motion is independent, and a litigant is entitled to a decision on the motion that disposes of the case.

6. The Court below by failing to pass upon the defendant's motion for judgment of acquittal made at the close of all the evidence (R. 318, 319), instead of acting upon and claiming discretionary power on the alternative motion made after verdict, departed from the accepted and usual course of judicial proceedings and calls for an exercise of this Court's power of supervision.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court on a day to be determined a full and complete transcript of the record of all the proceedings of such Court of Appeals had in this cause, to the end that the motion and decision therein may be reviewed and determined by this Court; that the judgment of the Court of Appeals may be modified; and that the petitioner be granted such other and further relief as may seem proper.

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BRIEF IN SUPPORT OF MOTION.

Opinions Below.

The decisions of the District Court for the Southern District of Florida on the three motions for judgment of acquittal are not supported by opinions, but the denials of the motions appear in the record at pages 310, 318 and 23. The opinion of the Court of Appeals on the appeal was rendered on May 13, 1949, (R. 349-359) and as of this date is unreported. The opinion of the Court of Appeals on the motion to amend the judgment was rendered on June 10, 1949 (R. 365-367) and is unreported as of this date.

Jurisdiction.

Jurisdiction is conferred upon this Court to review this cause by writ of certiorari by Section 1254 of the Judicial Code as enacted June 25, 1948, and this petition is filed within thirty days of the decision on the motion on which review is sought, as required by Rule 37(b)(2) of the Federal Rules of Criminal Procedure. The motion decided on June 10, 1949 (R. 365), was filed with the Court below on June 2, 1949 (R. 361), on a judgment entered on May 13, 1949 (R. 360).

The judgment was entered on May 13, 1949 (R. 360); and the motion to amend the judgment was filed within twenty-one days provided by Rule 32 of the Fifth Circuit covering the issuance of mandate. The motion was disposed of on June 10, 1949 (R. 365); and it is well settled that the time within which application may be made for review in this Court does not commence to run until after disposition of a motion seasonably filed and entertained. See *U. S.* v. *Seminole Nation* (299 U. S. 417, 421) and cases cited therein on motion for a new trial.

Statement of the Case.

The principal facts are set forth in the petition at pages 2 to 3 under the title, "Summary Statement of the Matter Involved."

Specification of Errors.

The United States Court of Appeals for the Fifth Circuit erred:

1. In denying the motion to amend the judgment to conform to Rule 29(a) of the Federal Rules of Criminal Procedure upon holding that the evidence was "insufficient to make out a *prima facie* case against the Defendent" (R. 356).

2. In holding that a new trial, instead of a judgment of acquittal, is an "appropriate" (Sec. 2106, Title 28, U. S. C. A.) and "just" (Sec. 2106, Title 28 U. S. C. A.) order upon a holding that the evidence "was insufficient to make out a *prima facie* case against the Defendant" (R. 356).

3. In failing to order that the motion for a judgment of acquittal made at the conclusion of all the testimony (R. 318) be granted, upon a holding that "the case should not have been submitted to the jury" (R. 356).

4. In holding that despite the holding that the evidence "was insufficient to make out a *prima facie* case against the Defendant" (R. 356), it had an election to grant a new trial instead of a judgment of acquittal.

5. In relying on the authority granted in Section 2106 of Title 28 U. S. C. A., instead of the more specific direction stated in Rule 29(a) of the Federal Rules of Criminal Procedure.

6. In failing to order, upon a holding that the evidence "was insufficient to make out a *prima facie* case against the Defendant" (R. 356), what the trial Judge was required to order upon a similar holding; that is, the entry of a judgment of acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure.

7. In ordering a new trial, instead of a judgment of acquittal, on a holding "that the evidence presented did not authorize a verdict of guilty" (R. 365).

8. In "thinking the defect in the evidence might be supplied on another trial" (R. 365) to be an "appropriate" (Sec. 2106, Title 28 U. S. C. A.) and "just" (Sec. 2106, Title 28 U. S. C. A.) reason for ordering a new trial instead of a judgment of acquittal

9. In holding that the prosecution, having had its day in Court, and "the evidence presented did not authorize a verdict of guilty" (R. 365) was entitled to a new trial in order that "the defect in the evidence might be supplied on another trial" (R. 365).

10. In ordering a new trial, instead of a judgment of acquittal, because one judge dissented, upon a majority holding "that the evidence presented did not authorize a verdict of guilty" (R. 365) and the evidence "was insufficient to make out a *prima facie* case against the Defendant" (R. 356).

11. In depriving the Defendant of the right to a judgment of acquittal which accrued to him at the close of all the evidence upon holdings that the evidence was "insufficient to make out a *prima facie* case against the defendent" (R. 356), that "the case should not have been submitted to the jury" (R. 356), and that "the evidence presented did not authorize a verdict of guilty" (R. 365).

The Statutes Involved.

The statutes and rules of procedure involved are set forth in full in the Appendix, infra, pages 16-21.

ARGUMENT.

Summary.

The issue here appears to us a very simple and elementary proposition, and we shall endeavor to state the issue and the proper action as succinctly as possible.

The Court below had before it a review of the trial court proceedings and found that the trial court erroneously permitted the case to go to the jury because the evidence was insufficient to make out a *prima facie* case and that the evidence did not authorize a verdict of guilty. Had the trial court reached the same conclusion, it would have granted the Defendant's motion for a judgment of acquittal, and a *fortiorari*, the Circuit Court is required to do what the trial court would have been required to do had it reached the correct conclusion; that is, enter a judgment of acquittal.

The Court below, instead of directing a judgment of acquittal, remanded the case with directions to have a new trial, with the thought that "the defect in the evidence might be supplied on another trial" (R. 365). Our position is that the ordering of a new trial instead of a judgment for acquittal is contrary to law and an abuse of judicial discretion.

Point I.

The Defendant's Right to a Judgment of Acquittal Matured When That Motion Was Made at the Close of All the Evidence.

A motion for judgment of acquittal was made by counsel for the defense at the close of the Government's case (R. 309-310); and it set forth eight different reasons why the motion should be granted. The first three points are addressed to the insufficiency of the evidence; however, the trial judge denied the motion without granting counsel an opportunity to argue the motion (R. 310).

The defense then offered evidence and at the conclusion of all the testimony renewed the motion for judgment of acquittal in identical form (R. 318), and again the trial judge denied the motion (R. 319).

Thereafter, within the five days allowed, the defense renewed its motion for judgment of acquittal, and in the alternative, for a new trial (R. 18-21). The trial judge also denied that motion.

The Court of Appeals held that the evidence was insufficient to make out a *prima facie* case against the defendant (R. 358) and that the case should not have been submitted to the jury (R. 356). That being so, the Defendant's right to a judgment of acquittal matured when he made the motion at the close of all the evidence (R. 318), and Rule 29(a) of the Federal Rules of Criminal Procedure expressly directs that in that event a judgment of acquittal be entered. The rule set forth in the Appendix (B. 17) leaves no discretion to the court but expressly states that it "shall" order the entry of judgment of acquittal "if the evidence is insufficient to sustain a conviction."

The Court of Appeals in determining this case was *inter alia* passing upon the action of the trial judge, and it held that the trial judge should have found the evidence insufficient to make out a *prima facie* case and that the case should not have been submitted to the jury. That being so, the entry of judgment of acquittal should have been ordered.

Point II.

The Court of Appeals is Governed by the Federal Rules of Criminal Procedure.

The Court of Appeals appears to question whether the Rules are applicable to it. Rule 54 set forth in the Appendix (B. 18-20) in subsection (a)(1), expressly includes the Court of Appeals in the Courts to which these rules apply. We know of no other Court of Appeals that has questioned the applicability of the Rules; in fact, by act and discussion the Third, Seventh and Ninth Circuits have accepted such rules as being applicable, and this Court by indirection has likewise held the rules to be applicable to the Courts of Appeals.

The following cases all make reference to the rule and act pursuant to it.

U. S. v. *Bozza* (155 Fed. 2d 592) (3 CCA)
U. S. v. *Renee Ice Cream Company* (160 Fed. 2d.) (3 CCA)
U. S. v. *Johnson* (165 Fed. 2d 42) (3 CCA)
Karn v. *U. S.* (158 Fed 2d 568 (9 CCA)
U. S. v. *Gardner* (171 Fed. 2d 753) (7 CCA)

This Court in *Bozza* v. *U. S.* (330 U. S. 160) by failing to instruct the Third Circuit as to the form this Court's modification was to take, indirectly approved the Third Circuit's judgment of acquittal previously made on other counts.

Point III.

The Circuit Court's Application of Rule 29(b) is Improper.

The Court of Appeals in its opinion on the motion disregards entirely subsection (a) of Rule 29 and relies entirely on subsection (b) as a basis for its election to order a new trial. The motion for judgment of acquittal made at the close of all the evidence (R. 318) was not waived by the subsequent motion in the alternative; nor did the motion in the alternative lodge in the court any discretion as to which motion it would grant.

The matter of a motion in the alternative was before this Court in *Montgomery Ward & Co.* v. *Duncan* (311 U. S. 243) in a civil case. The companion rule in Federal Rules of Civil Procedure (Rule 50) was before the Court, and it stated (p. 253):

> "If alternative prayers or motions are presented, as here, we hold that the trial judge should rule on the motion for judgment."

This holding, carried to a logical conclusion, requires the Court of Appeals to rule on the motion for judgment of acquittal under Rule 29(a), and not to by-pass that subsection and determine that subsection (b) grants a discretion.

Point IV.

Occasion for Judgment of Acquittal and New Trial Distinguished.

This Court in *Montgomery Ward & Co.* v. *Duncan* (311 U. S. 243, 251) had occasion to distinguish the grounds upon which a motion for judgment rests as contrasted to a motion for new trial. This was a civil case, and the counterpart of Rule 29 (Rule 50 of Federal Rules of Civil Procedure) was at issue. The Court said (p. 251):

> "Each motion, as the rule recognizes, has its own office. The motion for judgment cannot be granted unless, as matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury."

Obviously, pursuant to the foregoing holding the Court below had no choice under the holdings it made—that is, that the evidence was insufficient to make out a *prima facie* case, and that the case should not have gone to the jury—and it should have directed the entry of a judgment of acquittal.

Conclusion.

It is submitted that it is appropriate for this Court to correct the error of the Court of Appeals and that the writ should issue as prayed.

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APPENDIX.

Statutes and Rules of Procedure.

The pertinent statutes and Rules are Section 2106 of Title 28, U. S. C. A.; Section 3772 of Title 18, U. S. C. A.; Rules 1, 29 and 54 of the Federal Rules of Criminal Procedure; and Rule 32 of the Fifth Circuit.

The Statutes:

Section 2106, Title 28, U. S. C. A.

Determination. The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Section 3772, Title 18, U. S. C. A. (the last paragraph is particularly pertinent)

Procedure after verdict. The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt in district courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, District of Columbia, and Virgin Islands, in the Supreme Courts of Hawaii, and Puerto Rico, in the United States Circuit Courts of Appeals, in the United States Court of Appeals for the District of Columbia, and in the Supreme Court of the United States. This section shall not give the Supreme Court power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules

made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

The Federal Rules of Criminal Procedure:

Rule 1. Scope.

These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54.

Rule 29. Motion for Acquittal.

(a) *Motion for Judgment of Acquittal.* Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) *Reservation of Decision on Motion.* If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and

the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.

Rule 54. (Subsection (a)(1) is particularly pertinent.)

Application and Exception

(a) *Courts and Commissioners.*

(1) *Courts.* These rules apply to all criminal proceedings in the district courts of the United States, which include the District Court of the United States for the District of Columbia, the District Court for the Territory of Alaska, the United States District Court for the Territory of Hawaii, the District Court of the United States for Puerto Rico and the District Court of the Virgin Islands; in the United States circuit courts of appeals, which include the United States Court of Appeals for the District of Columbia; and in the Supreme Court of the United States. The rules governing proceedings after verdict or finding of guilt or plea of guilty apply in the United States District Court for the District of the Canal Zone.

(2) *Commissioners.* The rules applicable to criminal proceedings before commissioners apply to similar proceedings before judges of the United States or of the District of Columbia. They do not apply to criminal proceedings before other officers empowered to commit persons charged with offenses against the United States.

(b) *Proceedings.*

(1) *Removed Proceedings.* These rules apply to criminal prosecutions removed to the district courts of the United States from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law.

(2) *Offenses Outside a District or State.* These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by section 102 of this title.

(3) *Peace Bonds.* These rules do not alter the power of judges of the United States or of United States commissioners to hold to security of the peace and for good behavior under section 392 of this title, and under section 23 of Title 50, but in such cases the procedure shall conform to these rules so far as they are applicable.

(4) *Trials before Commissioners.* These rules do not apply to proceedings before United States commissioners and in the district courts under sections 576-576d of Title 18, relating to petty offenses on federal reservations.

(5) *Other Proceedings.* These rules are not applicable to extradition and rendition of fugitives; forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. They do not apply to proceedings under the Federal Juvenile Delinquency Act so far as they are inconsistent with that Act. They do not apply to summary trials for offenses against the navigation laws under sections 391-396 of Title 33, or to proceedings involving disputes between seamen under sections 256-258 of Title 22, or to proceedings for fishery offenses under the Act of June 28, 1937, sections 772-772i of Title 16, or to proceedings against a witness in a foreign country under sections 711-718 of Title 28.

(c) *Application of Terms.* As used in these rules the term "State" includes District of Columbia, territory and insular possession. "Law" includes statutes and judicial decisions. "Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in a territory or in an insular possession. "District Court", includes all district courts named in subdivision (a), paragraph (i) of this rule. "Civil action" refers to a civil action in

a district court. "Oath" includes affirmations. "District judge" includes a justice of the District Court of the United States for the District of Columbia. "Judge of a circuit court of appeals" includes a justice of the United States Court of Appeals for the District of Columbia. "Senior circuit judge" includes the chief justice of the United States Court of Appeals for the District of Columbia. "Attorney for the government" means the attorney general, an authorized assistant of the attorney general, a United States Attorney and an authorized assistant of a United States attorney. The words "demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12.

Rules—Fifth Circuit:

32. *Mandate.*

Mandate shall issue at any time after twenty-one days from the date of the decision, unless an application for rehearing has been granted or is pending. If such application is denied the mandate will be stayed for a further period of ten days. No further stay will be granted unless applied for within the delay given above. A mandate once issued will not be recalled except by the court and to prevent injustice. A copy of the opinion of this court shall accompany the mandate when a new trial or further proceedings are to be had in the lower court, and the charge for such copy shall be taxed in the costs of the case:

Provided, that in all cases entitled to precedence in this court, under section 7 of the act approved March 3, 1891, and amendments thereto, the mandate or other proper process shall issue after the expiration of seven days from the date of the decision, unless otherwise ordered by the court or one of the judges.

Federal Rules of Civil Procedure:

Rule 50. *Motion for a Directed Verdict.*

(a) *When Made: Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that

the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) *Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legel questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.